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No. 07-463

IN THE
Supreme Court of the United States

PRISCILLA SUMMERS, *ET AL.*,

Petitioners,

v.

EARTH ISLAND INSTITUTE, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. 215.4(a) and 215.12(f), as distinct from a particular site-specific project to which those regulations were applied, was final agency action ripe for judicial review under the Administrative Procedure Act.

2. Whether respondents' facial challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable when the Forest Service continued to apply the regulations nationwide after one timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

3. Whether respondents established standing to bring this suit.

4. Whether the court of appeals erred in affirming the district court's decision to set aside the challenged regulations nationwide.

RULE 29.6 STATEMENT

Respondents Earth Island Institute, Sequoia ForestKeeper, Heartwood, Center for Biological Diversity, and Sierra Club have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT

1. Before 1992, the United States Forest Service for decades had regulations providing for public comment and appeal of decisions concerning

> projects and activities for which decision documents are prepared, such as timber sales, road and facility construction, range management and improvements, wildlife and fisheries habitat improvement measures, forest pest management activities, removal of certain minerals or mineral materials, land exchanges and acquisitions, and establishment or expansion of winter sports or other special recreation sites.

36 C.F.R. 217.3(b) (1992). Minor actions such as routine building maintenance and individual Christmas-tree-cutting permits that had no "decision documents" were not subject to appeal. *Id.* § 217.3(a)(1). However, documented decisions were appealable, regardless of whether they were subject to the requirement of an "environmental analysis" (EA) or "environmental impact statement" (EIS) under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA). *See* 57 Fed. Reg. 43,180, 43,208-10 (Sept. 18, 1992) (listing decisions excluded from NEPA review that required a decision document and minor activities that did not).

In 1992, the Forest Service proposed eliminating administrative appeal of project-level decisions. 57 Fed. Reg. 10,444 (Mar. 26, 1992). The proposal was widely opposed, and Congress responded by enacting the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419 (16 U.S.C. 1612 note), which provides:

> (a) In general.—In accordance with this section, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1601 et seq.) and shall modify the procedure for appeals of decisions concerning such projects.
>
> (b) Notice and Comment.—
>
> > (1) Notice.—Prior to proposing an action referred to in subsection (a), the Secretary shall give notice of the proposed action, and the availability of the action for public comment ….
> >
> > (2) Comment.—The Secretary shall accept comments on the proposed action within 30 days after publication of the notice in accordance with paragraph (1).
>
> (c) Right to appeal.—Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action may file an appeal.

ARA § 322. Congress's rejection of the Forest Service's attempt to eliminate appeals and its establishment of statutory notice, comment, and appeal requirements reflected its intent to "allow for contin-

ued citizens' rights to participate in, and appeal decisions of, the Forest Service while providing for more timely consideration of such appeals." 138 Cong. Rec. H9870-02 (Sept. 30, 1992) (Conference Report).

Nonetheless, when the Forest Service promulgated its first ARA regulations in 1993, it provided that all decisions "categorically excluded" from NEPA analysis were exempt from comment and appeal under the ARA, *except* for timber sale decisions.[1] Because it believed the regulations unlawfully excluded from ARA procedures decisions "concerning projects and activities implementing land and resource management plans," ARA § 322(a), respondent Heartwood challenged these regulations in federal court in 1999. On September 15, 2000, the court entered a consent judgment incorporating a settlement agreement between Heartwood and the Forest Service. *Heartwood v. U.S. Forest Serv.*, Civ. No. 99-4255 (S.D. Ill.) (Sept. 15, 2000).

The consent judgment required the Forest Service to make ten categories of categorically excluded actions in addition to timber sales (such as controlled burns, mineral exploration and development of motorized recreation trails) subject to comment and appeal under interim rules, and the Forest Service did so. 65 Fed. Reg. 61,302 (Oct. 17, 2000). The consent judgment contemplated that the Forest Service

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[1] "Categorically excluded" actions under NEPA are those "which do not individually or cumulatively have a significant effect on the human environment … for which, therefore, neither an environmental assessment nor an environmental impacts statement is required." 40 C.F.R. 1508.4.

would issue new permanent ARA regulations, but it did not govern their substance. *Id.*

The Forest Service finalized its permanent regulations, including the rules at issue here, in June 2003. 68 Fed. Reg. 33,582 (June 4, 2003). Under the new rules, the Forest Service *expanded* the exemption from ARA notice, comment and appeal procedures to cover all decisions categorically excluded from NEPA analysis, *including* timber sales. 36 C.F.R. 215.4(a), 215.12(f) (2003). The exempted actions included timber sales up to 250 acres, forest-thinning up to 1,000 acres, and prescribed burns up to 4,500 acres. *See* 68 Fed. Reg. 44,598, 44,607 (July 29, 2003); 67 Fed. Reg. 77,038, 77,039 (Dec. 16, 2002). The Forest Service implemented the rules immediately and began carrying out projects without affording comment and appeal rights to the public, including the respondents here (collectively, the "Conservation Groups"). The Forest Service has admitted that it applied the challenged regulations to "thousands of agency projects" nationwide. Defendants' Motion to Clarify and Amend Judgment (DE 79, 7/26/05) at 6.

2. Respondent Earth Island Institute has "over 15,000 members in the U.S.," and has appealed "numerous timber sales on National forests in the Pacific Northwest and the Sierra Nevada's." J.A. 31. Respondent Sequoia ForestKeeper's "mission is to protect and restore the ecosystems of the Southern Sierra Nevada …." J.A. 32. Respondent Heartwood "is a coalition of environmental organizations whose primary interest and goals are the protection of forests and their resources in the central hardwood region in the central United States." J.A. 33. "Heartwood submitted comments to the Forest Service on

the challenged regulations, and continually comments on, and appeals, Forest Service proposed actions." *Id.* After the challenged rules were promulgated, Heartwood was denied comment and appeal opportunities throughout the Midwest, including for about twenty timber sales in the Allegheny National Forest. Pet. App. 71a.

Respondent Center for Biological Diversity has over 5,000 members throughout the western United States and beyond, and its "efforts to protect and preserve the National Forests include comments, petitions, and administrative appeals to the Forest Service …." J.A. 33. The Center finds it important to comment on and appeal timber projects that are categorically excluded under NEPA because "[p]ublic review improves the quality of the work and ensures that projects do not slip through the cracks even though they would have an impact to wildlife habitat or water quality." *Id.* at 90.

Respondent Sierra Club, with more than 700,000 members nationwide, seeks to "protect[t] and preser[ve] … the natural and human environment." J.A. 34. Declarant Craig Thomas of that organization has for many years "visited project sites, submitted comments, attended meetings, and in some cases appealed timber sales planned on many of the national forests in the Sierra Nevada." J.A. 96. Once the challenged regulations were promulgated, he was "prevented … from commenting on the underlying documents for such decisions … which would allow [him] to fully assess the impacts of such proposals … [and he was] unable to appeal decisions which rest on faulty science or which otherwise should be altered or reconsidered." *Id.* at 98.

3. In September 2003, the Forest Service approved the Burnt Ridge Project, a salvage timber sale in the Sequoia National Forest. J.A. 29. The Project would have involved logging approximately 1.6 million board feet of timber (about 300 log trucksworth) over 238 acres. *Id.* at 51. It was categorically excluded from NEPA analysis and thus excluded from public comment and appeal under the ARA by the challenged regulations. *Id.* at 51.

The Conservation Groups brought this action in the Eastern District of California to challenge the Burnt Ridge Project and the facial validity of the ARA comment and appeal regulations (and several other regulatory provisions no longer at issue). The Groups sought a temporary restraining order and preliminary injunction against the Project. They submitted two declarations by Ara Marderosian of Sequoia ForestKeeper and the Sierra Club explaining his use of the site and the injuries he would suffer if the Burnt Ridge Project proceeded. J.A. 15-27. The district court granted the preliminary injunction on grounds unrelated to the ARA claims now at issue. J.A. 70-71.

Thereafter, the parties reached a settlement in which the Forest Service agreed to "not reissue the Burnt Ridge Timber Sale without first preparing an EIS or EA for the project in accordance with NEPA." J.A. 73-77. The agreement provided that site-specific claims pertaining to Burnt Ridge would be dismissed, while the facial challenge to the regulations now at issue (and the others no longer at issue) would proceed. J.A. 74-75.

To support their facial challenge, the Conservation Groups submitted the declaration of Heart-

wood's Jim Bensman to explain how the regulations had caused him injury in relation to other projects in other parts of the country, in addition to the Burnt Ridge Project. Pet. App. 68a-77a. Bensman specifically named National Forests he has visited, many of them near his home in the Midwest, and explained how his use and enjoyment of the forests were adversely affected by his inability to appeal exempted projects, including "about 20 timber sales" in the Allegheny National Forest. Pet. App. 68a-71a.

The district court decided the facial challenge on July 2, 2005. Pet. App. 38a. The court held that the Conservation Groups had standing because they had "gone beyond speculative or conjectural injury" and demonstrated "harm to [their] use and enjoyment [that] comes from harm to the environment that in turn comes from being unable to effectively challenge Forest Service projects in national forests." J.A. 43a-44a. The court further found that the rules were "final agency action" under the APA and that "the impact of the regulations on Plaintiffs are 'sufficiently direct and immediate as to render the issue[s] appropriate for judicial review at this stage.'" Pet. App. 46a (citation omitted). On the merits, the court ruled for the Conservation Groups on four regulatory provisions and set them aside, including the ones now at issue, and for the Forest Service on four others.

The Forest Service took the position that the rules the court had set aside were still in effect outside the Eastern District of California, and filed a motion under Fed. R. Civ. P. 60(b) to allow it to continue applying them elsewhere. The Conservation Groups countered with a motion to enforce the judgment and for contempt. On September 20, 2005, the district court denied both the contempt motion and

the Forest Service's request that the regulations be set aside only in the Eastern District of California. Pet. App. 29a-37a. The court reasoned that while "[a]gencies are sometimes allowed to confine a ruling of one court to that circuit and proceed with their conflicting interpretation of the law elsewhere, … in order to adequately redress the harm suffered by Plaintiffs, the invalidation of the Forest Service regulations … must reach beyond the borders of the Eastern District of California." Pet. App. 31a-32a (citations omitted).

The Forest Service responded by subjecting all decisions, including very minor ones such as "short-term special use permits for pine-nut picking," to administrative appeal, even though such actions without decision documents had never been appealable. J.A. 91-92; *id.* at 83-84. The Forest Service then filed its appeal and a motion for stay with the district court, based in part on the burden of applying the court's ruling to these minor decisions. The Conservation Groups filed a motion to clarify that the order setting aside the rules reinstated the previous rules, which did not apply to actions without decision documents. The district court granted the Groups' motion, reasoning that "'[t]he effect of invalidating an agency rule is to reinstate the rule previously in force.'" J.A. 79 (citations omitted). The court requested further briefing on the stay motion in light of this clarification. *Id.* at 81.

Because the stay motion argued that the Conservation Groups lacked standing and would not be harmed by a stay, Groups submitted five more declarations to provide further detail about how the implementation of the rules would injure them. J.A. 83-102. The declarations cited numerous specific in-

stances where the Forest Service had denied comment and appeal rights on projects throughout the national forests, and explained how those projects impaired the use and enjoyment of the forests by the Conservation Groups' members. The district court denied the stay, finding that "Plaintiffs' concerns regarding ability to participate in the notice, comment and appeal procedures are significant. … On balance, the Forest Service's concerns regarding irreparable injury … are outweighed by Plaintiff's concerns about the inability to participate in decision making processes, and consequent potential harm to the environment." Pet. App. 27a-28a.

4. The court of appeals affirmed in part and reversed in part. The court agreed that the Conservation Groups had standing, finding that "the district court properly concluded … that Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." Pet. App. 9a. It also ruled that the facial challenge to the regulations now at issue was ripe because they had been applied to the Burnt Ridge Project. Pet. App. 14a. However, the court found that the challenges to the other regulations were not ripe because they had not been "applied in the context of the Burnt Ridge Timber Sale or any other specified project." *Id.*

The court ruled for the Conservation Groups on the ripe claim, finding that "[t]he Forest Service, to comply with the ARA, must promulgate regulations that preserve administrative appeals for any decisions subject to administrative appeal before the proposed changes in 1992. Had Congress wanted to categorically eliminate the right of appeal for timber sales and other categorically excluded Forest Service

actions, the ARA would not have been necessary." Pet. App. 20a.

Finally, the court affirmed the district court's refusal to limit relief to the Eastern District of California. Pet. App. 21a-22a. Although the court prefaced its discussion by stating that the result was "compelled by the text of the Administrative Procedure Act," it held that "[t]he district court did not abuse its discretion in issuing a nationwide injunction." *Id.*

SUMMARY OF ARGUMENT

The Administrative Procedure Act authorizes actions to review "final agency action" by parties "adversely affected or aggrieved." The APA's plain language and this Court's long-standing precedents establish that final legislative regulations are "final agency action" that may be challenged if the controversy is ripe. Decisions of this Court holding that broad, plaintiff-defined agency "programs" are not "final agency action" do not upset this precedent.

The Court's ripeness jurisprudence permits facial challenges to regulations when review is appropriate in light of the fitness of the issues for judicial decision and hardship to the plaintiff. When the issues are particularly fit for review, as when a regulation is challenged for inconsistency with the plain language of its authorizing legislation, and when the regulation has already been implemented to the plaintiff's detriment, both considerations favor review. By contrast, in a "pre-enforcement" challenge to a regulation that has not yet been applied, fitness for review will often be impaired by a lack of "concreteness," and a stronger demonstration of hardship—such as a showing that the litigant must choose between altering its "primary conduct" or

risking enforcement and possible penalties—may be required.

Here, it is undisputed that the challenged regulations were applied repeatedly by the Forest Service, including in the Burnt Ridge Project, so there is no doubt about whether and how they would be applied. The regulations' facial consistency with the ARA is a purely legal question of statutory construction suited to judicial resolution. And the Conservation Groups suffered hardship resulting from denial of notice, comment, and appeal rights under the regulations, both in the Burnt Ridge Project and elsewhere throughout the country. The claim is ripe for review.

If the Conservation Group's facial challenge is ripe, it cannot be moot. The mootness of a challenge to a particular action implementing a regulation does not moot an ongoing controversy over its facial validity. Moreover, while the Project remains relevant to the ripeness analysis because it helps demonstrate the necessary concreteness of the dispute, its settlement is irrelevant to mootness, as there is no question that the challenged regulations continued to be applied on a regular basis after the settlement.

As for standing, the Conservation Groups demonstrated multiple injuries, each sufficient to support their standing. The government concedes that the Burnt Ridge Project itself created sufficient injury when the suit was filed, and the Groups' additional standing declarations showed that they continued to be adversely affected by the challenged regulations throughout the country in multiple instances. That the Burnt Ridge Project was settled by the time the facial challenge was litigated does not affect standing, as the Groups showed that they continued to be

harmed by application of the rules in many other instances.

Finally, the APA grants district courts authority to completely set aside regulations that are contrary to law (what the government calls a "nationwide injunction"). The court of appeals correctly found that the district court did not abuse its discretion in refusing to limit its relief to the Eastern District of California (the government's district court argument) or to a single site-specific action (its argument now, which essentially reiterates its "final agency action" and ripeness arguments). This Court's policy of exempting the government from nonmutual collateral estoppel does not negate the authority conferred by the APA, and the governmental interests protected by this policy were considered by the district court when it found that, on balance, the nationwide interests of the Conservation Groups warranted setting the rules aside entirely. This Court should affirm that exercise of discretion.

ARGUMENT

I. The Regulations Are "Final Agency Action"

A. The APA's Language and This Court's Precedents Establish That Issuing Regulations Is "Final Agency Action"

The APA states that "final agency action for which there is no adequate remedy in a court [is] subject to judicial review." 5 U.S.C. 704. "Agency action," in turn, "includes the whole or part of an agency rule." 5 U.S.C. 551(13). Although the Act does not separately define "final," this Court's decisions give it a common-sense meaning, denoting actions that (1) "mark the 'consummation' of the agen-

cy's decisionmaking process" and are "not … of a merely tentative or interlocutory nature," and (2) are actions "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

Applying these principles, the seminal case of *Abbott Laboratories v. Gardner* held that issuing final regulations is "final agency action":

> [T]he regulations in issue we find to be "final agency action" within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704, as construed in judicial decisions.
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> The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. There is no hint that this regulation is informal … or only the ruling of a subordinate official … or tentative.

387 U.S. 136, 149, 151 (1967) (footnote and citations omitted); *see also Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967) ("[T]here can be no question that this regulation—promulgated in a formal manner after notice and evaluation of submitted comments—is a 'final agency action' …."). More recently, the Court in *National Park Hospitality Association v. Department of Interior* explicitly recognized that a regulation (even an *interpretive* regulation) "constitutes 'final agency action' within the meaning of … the APA." 538 U.S. 803, 812 (2003).

The regulations here were likewise published in the Code of Federal Regulations after notice-and-

comment rulemaking, and represent the formal consummation of the agency's decisionmaking process. They are definitive, not tentative or interlocutory. And they are legislative rules that have legal consequences defining the public's rights to participate in agency proceedings and the agency's obligation to permit such participation. Under the APA and this Court's decisions, promulgating such a rule is "final agency action."

That published regulations are subject to facial review under the APA (subject to normal ripeness analysis) is so well-settled that often the issue does not even arise in litigation. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (deciding facial challenge to regulation); *Reno v. Flores*, 507 U.S. 292 (1993) (same). Indeed, the federal government often argues successfully that promulgating regulations is "final agency action" triggering statutes of limitations governing APA actions. *Preminger v. Secretary of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008); *Fed. Lands Legal Found. v. U.S. Forest Serv.*, 13 F.3d 405, 1993 WL 503166 at *1 (10th Cir. 1993). Similarly, the government *agreed below* that the regulations were "final agency action." Answering and Reply Brief of Federal Appellants-Cross-Appellees at 5 ("[T]he 2003 Rule is final agency action.").

The government now argues for the first time that APA § 704, providing review of "final agency action for which there is no other adequate remedy in court," precludes facial review when an as-applied challenge could be brought later. Pet. Br. 19-21. However, this Court has held that § 704 must not be given a "restrictive" construction contradicting the

Act's aim of expanding judicial review. *Bowen v. Mass.*, 487 U.S. 879, 904 (1988). Thus, the "other adequate remedy in court" clause applies only where there is a remedy under a statute *other than the APA*:

> [T]he provision … makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action. As Attorney General Clark put it the following year, § 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures."

Id. at 903 (quoting Attorney General's Manual on the Administrative Procedure Act 101 (1947)); *see also FCC v. ITT World Commun., Inc.,* 466 U.S. 463, 469 (1984) ("The Administrative Procedure Act authorizes an action for review of final agency action in the District Court to the extent *that other statutory procedures* for review are inadequate.") (emphasis added); *Bennett v Spear*, 520 U.S. at 164-75 (claim could be brought under APA § 704 because there was no cause of action under another statute). The government cites no authority holding that the possibility of a later *APA* action precludes APA review under § 704.

B. *Lujan v. NWF* Addressed Plaintiff-Defined "Agency Programs," Not Final Regulations

The government argues that *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) *(NWF),* and similar decisions foreclosing review of broad agency "programs" untethered to specific reviewable actions, preclude review here. Pet. Br. 14-17. This case, how-

ever, does not involve a challenge to a nebulous agency "program," but review of a discrete agency action: issuance of final regulations. *NWF* does not preclude such review.

NWF held that plaintiff-defined collections of agency operations, planning documents, and activities are not "final agency action," but it took care to distinguish such non-actions from discrete orders and regulations:

> [Plaintiffs] challenge[d] the entirety of petitioners' so-called "land withdrawal review program." That is not an "agency action" within the meaning of § 702, much less a "final agency action" within the meaning of § 704. The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans.

497 U.S. at 890. The Court expressly acknowledged that regulations are final agency actions reviewable under the APA if ripeness and other justiciability criteria are met:

> If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe

> for review in the manner we discuss subsequently in text, it can of course be challenged under the APA by a person adversely affected ….

Id. at 890 n.2.

C. That Statutes Other Than the APA Provide for Facial Review Does Not Preclude Facial Review under the APA

According to the government, special judicial review provisions in statutes other than the APA, which provide for immediate challenges to regulations, evince Congressional intent to preclude facial review of regulations under the APA. Pet. Br. 20. The government's position cannot be squared with this Court's jurisprudence or the reasons for which Congress enacts special review statutes.

Abbott Labs specifically rejected the argument that special review provisions for some regulations promulgated under the Food, Drug & Cosmetic Act impliedly precluded APA review of other regulations issued under the same Act. *Id.* at 141. It would be even more of a reach to take the inclusion of review provisions in other laws enacted at widely different time periods as indicating congressional intent regarding APA review of regulations issued under the ARA, especially since the ARA was passed against the background presumption of APA review long ago confirmed in *Abbott Labs*.

Congress's creation of special review provisions for certain agency regulations indicates that Congress thought it particularly important to establish time and venue limitations to streamline review of those regulations, not that APA review would otherwise be unavailable. For instance, the Senate Report

on the Clean Water Act noted that, under *Abbott Labs*, review of regulations would likely be available and so it was desirable to provide for review "within controlled time periods" in the courts of appeals, to avoid two-stage trial and appellate review under the APA that might thwart the Act's ambitious deadlines. S. Rep. No. 92-414 (1971), 1972 U.S.C.C.A.N. 3668, 3750-51.

In short, congressional enactment of special review statutes merely confirms that "[i]n the … decades since *Abbott Laboratories*, 'preenforcement review of agency rules and regulations has become the norm, not the exception.'" *Clean Air Implementation Proj. v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) (quoting Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 1137 (2d ed. 1985)). *See also* 47 Fed. Reg. 46,512, 46,512-513 (Oct. 19, 1982) (statement of the Administrative Conference of the United States: "[D]irect judicial review of rules has come to be regarded as the norm and review in an enforcement proceeding as something of an exception."). Given this background norm, the absence of a special review provision in the ARA does not preclude facial review of ARA regulations, but merely indicates that Congress did not alter the presumption that review would occur in the district courts under the APA.

II. The Challenged Regulations Are Ripe for Review

A. The Ripeness Doctrine Requires an Intensely Practical Assessment of the Appropriateness of Immediate Review

Ripeness doctrine serves interests of courts and litigants in avoiding premature litigation over ab-

stract questions that may never require judicial resolution or that might be better decided later, in a more concrete setting. The doctrine has both constitutional and prudential dimensions. Constitutionally, ripeness implements Article III's case-or-controversy requirement by demanding that a plaintiff show that an injury either has occurred or is imminent enough to create a genuine dispute between the parties. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81 (1978). The constitutional component of ripeness largely duplicates the Article III standing requirement, which also demands actual or imminent injury in fact. *See id.*; *see also MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 772 n.8 (2007).

Ripeness comes into its own in its prudential dimension, where it imposes requirements beyond those of other justiciability doctrines. This Court has developed, and the lower federal courts have fleshed out, an approach to determining whether judicial intervention is appropriate or should be postponed until events create a greater need for review. The "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.,* 387 U.S. at 148-49.

Ripeness doctrine achieves these objectives by considering "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. These inquiries aim at weighing reasons that counsel in favor of or

against immediate review, and, if the considerations point in both directions, drawing the proper balance.

The "fitness" inquiry seeks to identify interests that would be served by postponing review. It focuses on whether the plaintiff's claims present legal issues appropriate for judicial resolution without more factual development, *id.*; whether the challenged action, even though "final" under the APA, is likely to be modified or elaborated in its application to particular circumstances in ways that would obviate the need for review, *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735-36 (1998); and whether future events are likely to shed additional light on the meaning of the agency's action and/or its lawfulness or rationality, so that the courts' ability to review the action would be enhanced by awaiting a challenge to a specific application. *Nat'l Park*, 538 U.S. at 812; *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967); *Toilet Goods*, 387 U.S. at 163-64. The latter circumstances are often present in a "preenforcement" setting, where a regulation or policy has not yet been (and may never be) applied, making it likely that review would benefit from a more concrete setting. *E.g., Toilet Goods,* 387 U.S. at 163; *Nat'l Park,* 538 U.S. at 812. By contrast, when an agency has implemented a policy, the necessary "concreteness" will likely exist even when the challenge is not limited to specific applications that have already occurred. *See Thomas v. Union Carbide*, 473 U.S. 568, 580-81 (1985).

The "hardship" inquiry seeks to identify circumstances that override the interests in postponing review. The analysis examines not only whether the plaintiff has shown injury imminent enough to create a case or controversy, but also whether postponing

review would itself create hardship. *Ohio Forestry*, 523 U.S. at 733. As this Court has noted, the showing of hardship often, but not invariably, involves a demonstration that if immediate review is denied, a directly regulated entity will have to choose between costly compliance with a regulation or risking punishment for noncompliance. *NWF*, 497 U.S. at 891.

This Court's decisions do not, however, establish that additional hardship beyond that necessary to establish a case or controversy is in all instances needed for ripeness, nor do they narrowly limit the hardship that will suffice to the compliance-or-risk-of-punishment dilemma. Rather, the Court's decisions make clear that neither fitness nor hardship, by itself, is dispositive in every case, and that various forms of hardship may be considered. *Nat'l Park*, 538 U.S. at 812 (holding claims unripe "in light of" analysis of both hardship and fitness); *id.* at 814 ("Both aspects of the inquiry involve the exercise of judgment, rather than the application of a black-letter rule.") (Stevens, J., concurring); *Ohio Forestry,* 523 U.S. at 733 (assessing hardship and fitness "taken together").[2]

Consistent with this Court's approach of weighing fitness and hardship together, the D.C. Circuit, in particular, has emphasized that the hardship showing is reduced when the fitness inquiry reveals no significant institutional interests in deferring review. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps*

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[2] Indeed, in both *National Park* and *Ohio Forestry*, the Court addressed fitness for review at length *after* finding an absence of hardship, which would be unnecessary if hardship were alone dispositive.

of Eng'rs, 440 F.3d 459, 464-65 (D.C. Cir. 2006) (Henderson, J., joined by Ginsburg and Randolph, JJ.) (*NAHB*); *Venetian Casino Resort v. EEOC*, 409 F.3d 359, 365-66 (D.C. Cir. 2005). In such cases, little or no hardship beyond the imminent injury in fact required for a case or controversy is required; "it is enough that the petitioner show that it has suffered sufficient hardship to pass the Article III threshold." *Consol. Coal Co. v. Fed. Mine Safety & Health Review Comm'n,* 824 F.2d 1071, 1081-82 (D.C. Cir. 1987).[3] Such circumstances are particularly likely in a facial challenge to an agency's statutory authority to issue a regulation, where the issues are purely legal, the agency's policy requires no further crystallization, the issues do not depend on a particular application of the rule, and there is no uncertainty about whether the agency is implementing the regulation as written. In such a case, "where … there are no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review." *NAHB*, 440 F.3d at 465 (citations and internal quotation marks omitted; brackets in original).

Moreover, although this Court has suggested that a "major" circumstance where hardship will render a facial challenge ripe is when "a substantive rule … as a practical matter requires the plaintiff to adjust his conduct immediately," *NWF*, 497 U.S. at 891, the

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[3] This approach comports with the view of amicus curiae Pacific Legal Foundation (a frequent opponent of the Conservation Groups in environmental cases) that ripeness factors should be viewed on a "sliding scale" with the showing of hardship reduced where fitness for review is strong because "purely legal issues" are presented. PLF Br. 8-15.

Court has never confined hardship to that circumstance. Indeed, in several of the leading ripeness cases cited in the Court's opinion in *Abbott Labs*, challenges to regulations were found ripe even though the challenger did not face the dilemma of altering its conduct or facing enforcement. *See, e.g., United States v. Storer Broad. Sys.*, 351 U.S. 192 (1956), *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Columbia Broad. Sys. v. United States*, 316 U.S. 407 (1942). And although the rules in those cases *affected* "primary conduct," the Court has made clear that such an effect is not necessary. For example, in *Thomas*, the Court found that the threat of having to resort to an assertedly unconstitutional procedure to adjudicate certain claims was hardship enough to make the case ripe. 473 U.S. at 579.

Similarly, *Ohio Forestry* states that the hardship relevant to ripeness includes not only threats of sanctions leading to immediate compliance by a regulated entity, but also other "adverse effects of a strictly legal kind" involving the parties' "legal rights or obligations." 523 U.S. at 733. The Court also recognized that whether an action "inflicts significant practical harm upon the interests that the [plaintiff] advances" is "an important consideration" in the ripeness analysis, *id.*, irrespective of any coercive impact on the plaintiff's "primary conduct." In particular, the Court emphasized that procedural violations are often ripe notwithstanding their lack of coercive effect on conduct. *Id.* at 737; *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300-01 (1979) (anticipatory challenge to law regulating election procedures ripe).

Challenges to rules affecting procedural rights are particularly likely to involve hardship justifying

review when an agency's adherence to the challenged procedures would frustrate a plaintiff's ability to bring a later challenge to a particular application. For example, in *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), the D.C. Circuit held that a challenge to an ICC rule allowing shippers to charge rates without a published tariff was ripe. Then-Judge Scalia, writing for the Court, explained that "the gravamen of petitioners' complaint is that any use of the rule is an abuse, precisely because it does not permit petitioners and others to know what rates are being offered," and that "[w]hen the very basis of attack is the secrecy of rates and hence the inability to challenge them [later], it would be absurd to hold the controversy unripe." *Id.* at 379.

Likewise, in *Electric Power Supply Association v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004), the court held that a rule abridging Sunshine Act disclosure requirements was ripe for challenge by a petitioner who was a regular participant in agency proceedings. The rule's denial of procedural rights, the court observed, had a "direct" and "immediate" effect on the petitioner, and, as in *Regular Common Carrier*, it would be "absurd" to require a later challenge because the rule made it more difficult to learn of, and hence challenge, ex parte communications. *Id.* at 1263-64. Similarly, in *Venetian Casino*, the D.C. Circuit held that a challenge to an EEOC policy of disclosing confidential documents without notice and a hearing was ripe before any particular documents had been released because denial of the claimed procedural rights constituted hardship, particularly given that waiting for disclosure would frustrate the purpose of the procedural safeguards; thus, it would

"mak[e] no sense to defer judicial review." 409 F.3d at 366.

B. Considerations of Fitness and Hardship Favor Review of the Challenged Regulations

1. The "Purely Legal" Issues Are Fit for Review

Each feature this Court has associated with fitness for review is present here. The Conservation Groups' claim was "purely legal"—that the ARA, which requires a "notice and comment [and appeal] process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," ARA §§ 322(a) & (c), does not permit exemption of agency decisions implementing such plans just because they are excluded from NEPA analysis. The challenge did not depend on how the challenged regulation was applied to any particular project or on consideration of any project-specific facts. From *Abbott Labs* to the present, such issues have been deemed presumptively fit for review. *See Abbott Labs.,* 387 U.S. at 149; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (where a party challenges a regulation's facial conformity with its authorizing statute, "[t]he question before [the Court] is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented'") (quoting *Ohio Forestry*, 523 U.S. at 733); *see also NAHB*, 440 F.3d at 464-65 (challenge ripe where the issue is whether a regulation "facially exceeds the agencies' statutory authority, and is not 'intertwined with how the Commission might exercise its discretion in the future'") (citations omitted); *Nat'l Mining Ass'n v.*

Fowler, 324 F.3d 752, 756-57 (D.C. Cir. 2003) ("[W]e ask first whether the issue raised in the petition for review presents a purely legal question, in which case it is presumptively reviewable.").

Moreover, there is nothing tentative, unclear or theoretical about the agency's position. Nor is it likely that the agency would have reconsidered or refined its regulation before applying it or that judicial intervention would interfere in some ongoing administrative process addressing the scope of ARA comment and appeal rights. *Cf. Ohio Forestry*, 523 U.S. at 735-36; *Toilet Goods*, 387 U.S. at 163-64. Rather, in addition to being the final product of formal rulemaking, the regulations at issue had been applied repeatedly, including in the Burnt Ridge Project and other instances described in the plaintiffs' declarations. These concrete examples underscore the absence of doubt about what the regulations mean and how the government is applying them, and dispel any suggestion that the dispute is "abstract" or involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 473 U.S. at 580-81 (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984)). In short, the "fitness" factors all point toward ripeness, and no institutional interests of either the courts or the government are threatened by deciding the Conservation Groups' challenge. Thus, "nothing would be gained by postponing its resolution." *Payne Enters. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988).

The government does not explicitly argue that the challenge here was not purely legal. It suggests, however, that the issue was too abstract for review outside a specific application of the regulations be-

cause the parties agree that not all Forest Service activities require notice, comment, and appeal. Thus, the government asserts, "this suit was ill-conceived as a 'facial' challenge to the regulations even if such a challenge could properly have been entertained." *See* Pet. Br. 27-28. However, that some activities, such as mowing lawns or sales of individual Christmas-tree cutting permits, fall outside the ARA because they are not "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," ARA § 322(a), does not mean that the validity of regulations that purport to exempt actions that *are* within the ARA's scope cannot be adjudicated on its face. Because the regulations improperly tie ARA notice, comment, and appeal rights to whether an action is exempt from NEPA requirements, they are unlawful regardless of whether there are *other* valid bases for carrying out particular activities without ARA procedures.[4] Moreover, striking down the regu-

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[4] As Justice Scalia has explained, a regulation that contradicts statutory requirements is not saved from invalidity simply because it could be applied to some set of circumstances where the statutory requirements, for some unrelated reason, "*happe[n] to be*" satisfied (or inapplicable). *See Babbitt v. Sweet Home,* 515 U.S. at 731 (Scalia, J., dissenting) (emphasis added). Such a regulation is "invalid in all its applications," even if some "*different* regulation" might be lawfully applied to reach the same result in some instances. *Id.* at 731-32; *see also* Stuart Buck, *Salerno v. Chevron: What to Do About Statutory Challenges*, 55 Admin. L. Rev. 427, 464 (2003) ("Where the regulation flatly contradicts the statute, the contradiction affects every possible application, which is why facial invalidation is appropriate."). Thus, assuming that the requirement for facial invalidity of a regulation is that there be "no set of circumstances … under which the [regulation] would be valid," *Reno v.*

(*Footnote continued*)

lations did not require the lower courts to define what actions are not subject to the ARA for other reasons, and thus did not require that such actions be before the courts.[5]

2. The Conservation Groups Suffered Hardship

Because the fitness inquiry reveals no substantial institutional interests in deferring review, the importance of the hardship inquiry is commensurately reduced. *See supra* 21-22. Even so, hardship considerations strongly reinforce the conclusion that the facial challenge is ripe.

The regulations impose "adverse effects of a strictly legal kind," *Nat'l Park,* 538 U.S. at 809, and "inflic[t] significant practical harm upon the interests that the [plaintiffs] advance[]." *Ohio Forestry*, 523 U.S. at 733. The rules limit the Conservation Groups' legal entitlement to notice, comment and appeal under the ARA by exempting many Forest Service actions from those procedures. The Forest

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Flores, 507 U.S. 292, 301 (1993); *but see City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (opinion of Stevens, J.), the regulations here must fall, because there is "no set of circumstances" under which the applicability of the ARA's procedural requirements depends on whether an action is categorically excluded from NEPA review.

[5] That the district court ultimately clarified the categories of actions that were subject to appeal under its order, J.A. 79, does not mean that the court was adjudicating facts not before it. The clarification only reflected that those actions were subject to notice, comment and appeal under the *Forest Service's interim regulations in effect before promulgation of the challenged rules.* The prior rules sprang back into place once the challenged rules were vacated. *Id.*

Service acknowledged that it applied the rules to cut off comment and appeal rights for "thousands of agency projects" nationwide, Defendants' Motion to Clarify and Amend Judgment (DE 79, 7/26/05) at 6, and the Conservation Groups' declarations demonstrated that the rules' implementation impaired their rights with respect to Forest Service projects throughout the country.

Specifically, the Groups explained that the rules not only had prevented them from commenting on and appealing the Burnt Ridge Project, but also that, on an ongoing basis, the rules "limit citizen participation and make it significantly more difficult … to monitor and participate in projects that implement the Sequoia National Forest management plan." J.A. 17. The Conservation Groups provided examples of the rules' application to their detriment in other forests as well. They pointed to "about 20 timber sales" on the Allegheny National Forest in Pennsylvania that they were not able to comment on or appeal. Pet. App. 71a. They also explained that "the El Dorado National Forest proposed to conduct most of its logging projects as categorically excluded projects exempt from … ARA procedures" and "[t]he rules have prevented [us] from commenting on the underlying documents for such decisions [and we have] been unable to appeal decisions which appear to rest on faulty science or which otherwise should be altered or reconsidered." J.A. 98. They cited additional examples as well, J.A. 85-88, 90-91, 94, and explained that monitoring, commenting on, and appealing Forest Service decisions is a regular part of their activity (*e.g.*, J.A. 97), and that the Forest Service's ongoing application of the regulations will continue to "har[m] [their] ability to review or challenge

unsound forest projects." J.A. 99; *see also* J.A. 88, 91.[6]

In *Ohio Forestry*, this Court acknowledged that precisely such effects constitute hardship for ripeness purposes. In explaining that the action challenged there did not "create adverse effects of a strictly legal kind," the Court pointed out that it "*does not … abolish anyone's legal authority to object to trees being cut*." 523 U.S. at 733 (emphasis added; citation omitted). That is exactly what the challenged rules do.

More broadly, both this Court and the lower courts have found hardship when the ongoing application of a law, regulation or policy denies procedural entitlements to regular participants in an administrative process. In *Thomas*, this Court held that uncertainty about the legality of a statutory arbitration process was enough for ripeness. 473 U.S. at 581. There, as here, "[n]othing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution of the" law's validity. *Id.* at 582; *see also, e.g.*, *Babbitt v. UFW*, 442 U.S. at 300 (challenge to election procedures ripe where plaintiffs claimed that procedures' inadequacy discouraged their use); *Electric Power Supply*, 391 F.3d at 1263 (regulation limiting procedural rights

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[6] The government suggests that the Court disregard the declarations filed in response to the government's stay application. Pet. Br. 23 n.8. But because "'it is the situation now rather than the situation at the time of the [decision under review] that must govern'" ripeness, *Anderson v. Green*, 513 U.S. 557, 559 (1995) (citation omitted), the Court cannot disregard the most current information in the record.

had a "direct and immediate" impact on a regular participant in agency proceedings); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92-96 (D.C. Cir. 1986) ("frequent FOIA requesters" could challenge agency FOIA practices because their "daily conduct and decision-making are affected"); *Nat'l Treas. Employees Union v. Cornelius,* 617 F. Supp. 365, 367 (D.D.C. 1985) (challenge to agency appeal procedures ripe because "[t]here is no reason why the Court must wait until a[n] [organization's] member loses his right to appeal before considering the validity of these regulations").

The government's suggestion that these hardships are insufficient because plaintiffs could later bring as-applied challenges is unpersuasive. As this Court said in *Sullivan v. Zebley*, "[w]e fail to see why each [plaintiff] … should be compelled to raise a separate, as-applied challenge to the regulations, or why a facial challenge is not a proper response to the systemic disparity between the statutory standard and the [challenged regulations]." 493 U.S. 521, 536-37 n.18 (1990). Where "nothing would be gained by postponing a decision," *Thomas*, 473 U.S. at 581, using the hardship criterion to relegate plaintiffs to as-applied challenges when their interests are being adversely affected on an ongoing basis is unnecessary and inappropriate, and would needlessly subject the courts to a proliferation of as-applied challenges.

Moreover, the nature of the procedural rights here makes as-applied challenges problematic, supplying an additional element of hardship. In many cases, the rules allow projects to go forward without *any* public notice, rendering as-applied challenges difficult if not impossible. J.A. 101-102 ("On multiple occasions, the Forest Service has made the decision

to conduct a [categorically excluded] project the day the project is implemented or we receive the decision in the mail after the project has been completed.").[7] Even when the public receives notice, the challenged regulations do not provide for a stay of the action to allow judicial review, in contrast to the ARA, which provides a 15-day stay after an appeal is decided. ARA § 322(e)(2). Thus, unless a litigant can immediately find a lawyer to file a complaint and motion for temporary restraining order, and then convince the court to issue a TRO based on the as-applied ARA challenge, the action can be carried out before review is completed. J.A. 101; *see also* Pet. App. 76a.

Thus, as the district court found in denying the Forest Service's motion for stay, the possibility of as-applied review is no substitute for the relief granted in the facial challenge (Pet. App. 27a):

> Plaintiffs' concerns regarding ability to participate in the notice, comment and appeal procedures are significant. While in some instances

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[7] The Forest Service asserts that it always provides notice of proposals. Pet. Br. 23 & nn.7 & 8. Although notice is provided for many actions, the regulations exempt others, including those discussed by Bensman at J.A. 101-02. The government's assertion (Pet. Br. 23 n.8) that all decisions involving off-road vehicle use are subject to public notice under 36 CFR 212.52 is incorrect: that regulation requires notice of *designation* decisions but not *site-specific* construction and special-event decisions. Moreover, "scoping" and quarterly publications provide very sketchy information about exempted projects, which impedes plaintiffs' ability to assess whether a challenge is appropriate. *See* Pet. App. 73a-74a; J.A. 98. And quarterly publications by definition cannot provide notice of actions that the Forest Service proposes and decides to implement between publications.

> these concerns could be abated by the ability to sue the Forest Service over specific projects, this is small comfort given … the potential for irreparable harm to the environment before and during suit.

Where, as here, a regulation frustrates as-applied challenges, a facial challenge is ripe. In such circumstances, "delayed review would cause hardship to the plaintiffs" because they do *not* have "ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry*, 523 U.S. at 733, 734. The premise of *Ohio Forestry*'s view that the availability of as-applied challenges to logging projects obviated hardship otherwise attributable to the challenged forest plan was that "before the Forest Service can permit logging, it must … prepare an environmental review [and] permit the public an opportunity to be heard …." *Id.* at 734. The regulations here remove precisely those procedural mechanisms that would facilitate as-applied challenges. To nonetheless relegate the Conservation Groups to as-applied challenges would be, in then-Judge Scalia's words, "absurd." *Regular Common Carrier*, 793 F.2d at 379.

3. "Hardship" Need Not Involve "Primary Conduct"

The government insists that the challenged rules pose no hardship because they do not regulate the Conservation Groups' "primary conduct." *See* Pet. Br. 16, 22. As explained above, however, although a coercive impact on primary conduct may be *sufficient* to demonstrate hardship, this Court has never held that it is *necessary*.

The Court has stressed this factor primarily in "pre-enforcement" challenges, where a regulated entity seeks a ruling on a regulation or policy before it has ever been applied. Because of the strong institutional interests in avoiding questions that may never arise and not interfering with agency enforcement actions, the Court has sometimes required greater showings of hardship in such cases, such as demonstrations that the agency action effectively requires a regulated entity to alter its conduct immediately. Thus, in *Toilet Goods*, where the Court had "no idea whether or when" a regulation would be applied, or in what circumstances, 387 U.S. at 163, it stressed that the regulated companies faced little hardship because the rule did not require them to alter their "primary conduct" and had no "impact" that would "be felt immediately by those subject to it in conducting their day-to-day affairs." *Id.* at 164. Similarly, in *National Park*, the Court confronted a challenge to an advisory rule that had not been applied to any case. 538 U.S. at 811-12. That the rule had no immediate effect on anyone's primary conduct was a powerful reason for deferring review of the abstract and hypothetical questions that the challenge posed. *Id.* at 810.[8]

This case is very different. It is not a "pre-enforcement" challenge because it is not an effort to block "enforcement" actions and *does not precede im-*

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[8] In *Reno v. Catholic Social Services*, not only had the challenged regulation not been applied, but the Court could not even make a "firm prediction" that it would ever be applied. 509 U.S. 43, 58 n.19 (1993). Thus, the absence of an immediate impact on anyone's day-to-day affairs was a significant factor that supported deferring review. *Id.* at 57-58.

plementation of the challenged rules. The regulations have been applied many times to the Conservation Groups, and by the government's admission have been applied to thousands of projects nationwide. *Thomas* illustrates the distinction between such a case and a "pre-enforcement" challenge. There, an earlier challenge to a statutory arbitration requirement had been held unripe because the law had never been applied; the claim "thus involved 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" 473 U.S. at 580-81 (citation omitted). By the time *Thomas* was decided, one arbitration proceeding had taken place and others were certain to follow. *Id.* at 581. Although the result of the completed arbitration was not challenged in *Thomas* (just as the Burnt Ridge Project is no longer challenged here), these facts made the case no longer "contingent." Because the legal issue was highly suitable for review, the Court found enough hardship to support ripeness merely in the injury of being subjected to an allegedly unlawful procedure and the interest in speedily determining its validity. *Id.* at 581-82.

Similarly, in *Sullivan v. Zebley*, the Court saw no reason to defer facial review where a regulation was being applied on an ongoing basis, even though it did not regulate primary conduct. 493 U.S. at 537 n.19. Here, too, where the challenged regulations were regularly and frequently applied, there is no reason to require a heightened showing of hardship, such as a coercive effect on "primary conduct," because the problems of fitness for review posed by a regulation that may never be applied in a concrete setting are absent. The rules' impact on the Conservation Groups' "primary institutional activities," *Better*

Gov't, 780 F.2d at 93, of commenting on and appealing Forest Service decisions, *see, e.g.,* Pet. App. 71a, J.A. 89, 93, 96-97, supplied any necessary hardship even though the rules did not directly "regulate" the Groups' conduct.

Nor does the procedural nature of the regulations here preclude ripeness. The Groups may not be the "object" of the agency's underlying actions, Pet. Br. 24, but their rights are the object of the challenged regulations, and nothing in this Court's ripeness jurisprudence forecloses a facial challenge to procedural regulations. As one court has observed, "[t]here is no language in [*Abbott Labs*] that supports … a substantive-procedural distinction." *Food Town Stores, Inc. v. EEOC*, 708 F.2d 920, 922 n.1 (4th Cir.1983). Moreover, *Ohio Forestry* acknowledges that procedural challenges may be ripe even when a substantive challenge would *not* be. 523 U.S. at 737. Actions challenging an agency's across-the-board reliance on a procedural rule, where "the gravamen of petitioners' complaint is that any use of the rule is an abuse," *Regular Common Carrier*, 793 F.2d at 379, may be more suitable for facial challenges than substantive claims because their focus is not the correctness of any one decision: They assert that a statute "guarantees a particular procedure, not a particular result." *Ohio Forestry*, 523 U.S. at 737.

Finally, nothing in this Court's decisions suggests that the ripeness doctrine is intended to give regulated industries preferential rights to challenge agency actions as compared to other citizens, public interest groups, or state and local governments with interests adversely affected by agency action (as suggested in the amicus brief of American Forest & Paper Assoc. *et al.* at 8-10). The doctrine's purpose is to

determine whether a challenged action has impacts imminent and meaningful enough to justify judicial intervention. As the non-ripeness outcomes in *National Park* and *Toilet Goods* illustrate, regulated industries do not receive preferential treatment in that analysis. The critical factor is whether the action creates "adverse effects of a strictly legal kind" or "inflicts significant practical harm upon the interests that the [plaintiff] advances." *Ohio Forestry*, 523 U.S. at 733. Those criteria can be satisfied—or not—regardless of whether the plaintiff is a regulated industry. Here, the immediate and ongoing legal effects of the regulations on the Conservation Groups' rights and their practical ability to carry out major aspects of their organizational programs are more than sufficient.

III. The Case Is Not Moot

The government's mootness argument adds nothing to its ripeness argument, because its premise is that the facial challenge is not ripe and only a site-specific action is reviewable. If the facial challenge is ripe, it cannot be moot, for the mootness of an as-applied challenge does not moot a ripe, ongoing controversy over a law's facial validity. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122-25 (1974) (suit challenging labor regulations not moot despite settlement of strike that prompted suit); *see also, e.g., Capitol Tech. Servs. v. FAA*, 791 F.2d 964, 968-69 (D.C. Cir. 1986) (mootness of as-applied challenge did not moot ripe facial challenge). As Judge Douglas Ginsburg has put it: "The Government's failure to contest the existence of the alleged policy precludes it from prevailing in the argument that the controversy became moot once [the as-applied challenge

was mooted]; the complaint challenges the Government's policy, not merely [its application]." *Ukrainian-American Bar Ass'n v. Baker*, 893 F.2d 1374, 1377 (D.C. Cir. 1990). Here, there is no dispute that the Forest Service continued to apply the challenged rules to thousands of agency projects after the Burnt Ridge settlement, including projects affecting the Conservation Groups. *See* Pet. App. 71a; J.A. 83-102.[9] Whatever else may be said of the facial challenge, it is not moot.

The government's real argument is not that the facial challenge is moot, but that once the as-applied Burnt Ridge challenge was settled, the lower courts should have disregarded the Project in assessing the *ripeness* of the facial challenge. *See* Pet. Br. 36-39. The government's argument misconceives the different purposes of mootness (assuring enough "continuing interest" in a case to satisfy Article III requirements throughout, *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 192 (2000)) and prudential ripeness (ensuring that the time is right for judicial intervention, *Abbott Labs.,* 387 U.S. at 148-49). The importance of identifying an application of a regulation in ripeness analysis is to verify that the agency's position is "concrete" and "refined," not "abstract" and "theoretical." *Nat'l Park*, 538 U.S. at 807; *Ohio Forestry*, 523 U.S. at 735. Applications of regulations that by themselves no longer present a live contro-

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[9] The Conservation Groups' post-judgment declarations cannot be excluded with respect to mootness, which depends on conditions now. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Post-judgment submissions must therefore be considered. *See Bd. of Lic. Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985).

versy may still show that adjudication would not risk "entangling [the court] in abstract disagreements." *Thomas*, 473 U.S. at 581 (quoting *Abbott Labs.*, 387 U.S. at 148). *Thomas* is, again, particularly instructive because of its reliance on a completed arbitration—any controversy over which was moot—as providing the necessary element of concreteness to make the challenge to the statutory arbitration requirement ripe. *Id.*[10]

Here, too, the regulations' application to Burnt Ridge underscored the absence of doubt about the meaning and effect of the regulations, and whether the agency would apply them as written. As in *Thomas*, the courts below correctly considered the application of the regulations as part of the prudential ripeness calculus, even though Burnt Ridge was no longer at issue.

IV. The Conservation Groups Have Standing

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw,* 528 U.S. 167 at 180-81. Procedural rights like those at issue here are "special": "The person who has been ac-

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[10] *See also Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 581-83 (1980) (holding that a particular agency action, even if no longer at issue, helped show there was "nothing speculative" about the agency's position and "contribute[d] to the concrete controversy" in a facial challenge).

corded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy," and injury in fact is present if "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 nn.7 & 8 (1992). Thus, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Mass. v. EPA*, 127 S. Ct. 1438, 1453 (2007).

The government's position that the Conservation Groups did not demonstrate injury in fact is fundamentally misguided. At the outset, standing for the facial challenge rested on two bases: the on-the-ground injuries resulting from the denial of comment and appeal rights regarding the Burnt Ridge Project, and the similar ongoing injuries and threats of injury attributable to the government's admitted application of the regulations to thousands of projects nationwide. Together, these injuries established that the plaintiffs had an underlying "concrete interest" that was imminently threatened by the Forest Service's violation of the ARA's procedural requirements.[11] That one of the injuries later fell by the wayside does not oust the courts of jurisdiction because the remaining injuries were at least sufficient

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[11] The government does not challenge the existence of causation or redressability, which are easily satisfied here under *Defenders*, 504 U.S. at 573 n.7, and *Mass. v. EPA*, 127 S. Ct. at 1453.

to avoid mootness, and, indeed, would have sufficed for standing even without Burnt Ridge.

The Groups provided declarations of Ara Marderosian describing the Forest Service's failure to comply with ARA procedural requirements in connection with Burnt Ridge and detailing how he used the site of that Project and how his use and enjoyment of the area would be harmed by the Project. J.A. 15-27. The government now "agree[s]" that these declarations "established a likelihood that Marderosian would be injured" and "demonstrated respondents' standing to challenge the Burnt Ridge Project *itself*"—including the lawfulness of the regulations at issue in that context. Pet. Br. 28.

The government's concession is correct as far as it goes, but does not go far enough. The Marderosian declarations, together with the threat of future injuries attributable to the government's conceded application of the regulations nationwide, established standing for the facial challenge because they demonstrated threatened injuries resulting from the regulations that setting them aside would redress. *See Mass. v. EPA*, 127 S. Ct. at 1453. The ongoing injuries and threats of injury attributable to Forest Service projects conducted in violation of ARA were further documented in the first Bensman declaration (Pet. App. 68a-77a), and the additional declarations submitted when the Forest Service again raised standing in its motion for stay pending appeal. J.A. 83-102.

Bensman's first declaration describes his regular use of National Forests, details his ongoing efforts as a Heartwood member to protect forests from environmental degradation resulting from Forest Service

projects, relates that the challenged regulations denied him notice, comment, and appeal rights on at least 20 such projects, and explains how his use and enjoyment of the forests suffered as a result. Pet. App. 68a-77a ¶¶ 2-14, 32. The declaration also describes how the denial of ARA rights impairs those interests on a continuing basis. *Id.* Bensman's averments, like Marderosian's, demonstrate impairment of "concrete" interests attributable to the Forest Service's procedures. *See Laidlaw*, 528 U.S. at 183-84.

The Conservation Groups submitted five more declarations to counter the Forest Service's stay motion, which again argued that "[j]urisdiction is lacking because … Plaintiffs lack standing."[12] In his second declaration, Bensman described pending, specifically named projects involving sites used by him and other Heartwood members, where the regulations would deprive him of comment and appeal rights and the proposed projects would impair recreational and aesthetic interests of Heartwood members. J.A. 84-88. Erik Ryberg of the Center for Biological Diversity described how the regulations deprived him and his organization of comment and appeal rights, citing a specific project in Idaho's Payette National Forest implicating his interests. *Id.* at 89-92. The Sierra Club's Rene Voss described how the regulations prevented the Sierra Club from appealing projects on lands of interest to its members and provided a specific example in Montana's Gallatin National Forest. *Id.* at 93-94. Craig Thomas of the

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[12] Memorandum in Support of Defendants' Motion for Stay Pending Appeal at 2.

Sierra Club explained how the regulations systematically stymied his ongoing efforts to comment on and appeal projects in forests throughout California, including 1000-acre logging projects classed as "fuel reduction" efforts, and described how the Forest Service sought to exclude 18 specific projects in the El Dorado National Forest from ARA procedures. *Id.* at 95-100. And in a third declaration, Bensman told how the regulations were used to permit off-road-vehicle events and "wildlife opening" logging operations in national forests that, his earlier declarations had explained, he and other Heartwood members visited. J.A. 101-02.

These submissions—none of which was contested factually—together with the Forest Service's admission that it was applying the challenged regulations to thousands of projects nationwide, leave no doubt that the denial of procedural rights injured the Conservation Groups' concrete interests and posed a "realistic threat" of further injuries, affording standing to seek prospective relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7 (1983). Each of the government's counterarguments lacks merit.

The government's contention that the Burnt Ridge settlement eliminated plaintiffs' standing to challenge the rules, Pet. Br. 28-29, "conflates … standing with … mootness." *Becker v. FEC*, 230 F.3d 381, 387 n.3 (1st Cir. 2000). If there is standing at a case's commencement, the court retains jurisdiction unless the case becomes *moot*. The burden of showing a threat of ongoing injury sufficient to avoid mootness is less weighty than that of demonstrating standing initially, because "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative

to support standing, but not too speculative to overcome mootness." *Laidlaw*, 528 U.S. at 190. Here, the injuries attributable to Burnt Ridge and the realistic threat of future injury established standing for the facial challenge at the outset of the suit. Under the mootness standard, the government's admitted, ongoing application of the regulations and the Conservation Groups' uncontested averments that they have interests in national forests that will be threatened by at least some projects subject to the regulations demonstrate a continuing risk of injury that is not so "speculative" as to render the facial challenge moot, despite the abatement of the Burnt Ridge injuries. *Id.*

In any event, the Conservation Groups' declarations demonstrate standing for the facial challenge regardless of Burnt Ridge. The government criticizes the first Bensman declaration for not showing that "the regulations would likely be applied to some specific project that, if consummated, would impair the enjoyment of the affected area by the identified members." Pet. Br. 29-30. That Bensman did not provide the name of each timber sale that affected his interests is unimportant. As the Court has stated, "[s]tanding is not 'an ingenious academic exercise in the conceivable,'" *Defenders*, 504 U.S. at 566 (citation omitted), but neither is it a "gotcha trap" (*Am. Library Ass'n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005)) that turns on over-parsing a declaration where there is no realistic dispute that plaintiffs have been injured. And even as it quibbles over Bensman's failure to name the 20 projects, the government makes clear that even if he had done so it would not be satisfied: It demands that the plaintiffs identify specific projects where they *would in the fu-*

ture be denied notice, comment and appeal rights, Pet. Br. 29-30—an obvious impossibility. The uncontested fact that the regulations were applied to projects in forests used by members of the Conservation Groups, together with the government's acknowledgment that it was applying the regulations throughout the National Forest system, amply established that the regulations posed an imminent threat, regardless of the names of specific past or future projects. *Cf. Blum v. Yaretsky*, 457 U.S. 991, 1001 (1982) (finding standing based on "realistic threat" of unlawful action "[i]n light of similar determinations already made") (citing *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) ("past wrongs are evidence bearing on whether there is real and immediate threat of repeated injury")).

If more specificity were needed, the declarations submitted in opposition to the government's stay motion supplied it. The government does not even argue that these declarations do not show injury, but only that they were "untimely." The government, however, relies principally on cases rejecting declarations that were provided for the first time *to this Court*. Pet. Br. 33 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) and *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970)). The government also cites *NWF*, where the *district court* excluded the declarations, but this Court addressed them anyway (497 U.S. at 890-94) before holding in the alternative that the district court "did not abuse its discretion" in excluding them. *NWF* at 894.

Here, the declarations were properly filed in opposition to the stay motion. Far from excluding them, the district court *relied* on them in holding that the Conservation Groups had shown a stay

would injure them. Pet. App. 27a-28a. The declarations are part of the record, and there is no reason to exclude them now.[13] Because the government does not dispute that the declarations demonstrate standing, it would be particularly unjust to dismiss the Groups' challenge only because they may not have "document[ed] fully their standing at the earliest possible stage in the litigation." *Am. Library Ass'n*, 401 F.3d at 493 (considering supplemental standing declarations).

The government takes pains to tear down a straw man in arguing that a procedural injury cannot support standing without a "tangible stake in the outcome of the agency's decision-making process." Pet. Br. 30. The Conservation Groups do not rely on purely procedural injury, but on violations of procedural rights "designed to protect some threatened concrete interest … that is the ultimate basis of [their] standing." *NWF*, 504 U.S. at 573 n.8. That concrete interest is the use and enjoyment of National Forests. Nor did the Ninth Circuit find standing based on procedural injury alone; rather, the court required the Conservation Groups to show "cognizable injuries in fact" including injuries to members' "[a]esthetic and environmental interests," and it found the Groups had demonstrated a threat of "diminished recreational enjoyment of the national fo-

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[13] Considering the declarations is consistent with normal appellate practice when a defendant has been denied summary judgment and later appeals from a final judgment. Appellate courts typically consider *all* record evidence, not just the summary judgment record, in determining whether the evidence supports the judgment. *Cf., e.g., Pahuta v. Massey-Ferguson, Inc.,* 170 F.3d 125, 130-31 (2d Cir. 1999).

rests." Pet. App. 9a. The court's observations about "procedural injury," far from dispensing with the need to show harm to concrete interests, emphasized that procedural injuries are cognizable when they result in some "injury alleged to have occurred as a result of violating [the] procedural right." *Id.* at 9a-10a.

Nor does *Defenders* foreclose standing here. There, the plaintiffs sought not to enforce procedural rights afforded *them*, but *internal* procedures requiring intra-governmental consultations; thus, they asserted only "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." 504 U.S. at 573. Moreover, the claim that the alleged violations had injured the plaintiffs concretely rested on "pure speculation," *id.* at 567, because, as the concurring Justices pointed out, it was "not … reasonable to assume that the affiants will be using the [affected] sites [in Egypt and Sri Lanka] on a regular basis." *Id.* at 579 (Kennedy, J., concurring). Thus, the claims in *Defenders* satisfied neither critical requirement for standing in a procedural rights case: They did not invoke a personal right, and they did not demonstrate any connection between the procedures and protection of the plaintiffs' concrete interests.

Here, by contrast, the ARA does not merely control the agency's internal affairs, it requires a public comment process and creates a "right to appeal" for commenters. ARA § 322(c). These rights are aimed at protecting the commenters' concrete interests in the use and enjoyment of the national forests, and do not violate the principle that Congress may not "confer rights of action … in the absence of any showing of concrete injury." *Defenders*, 504 U.S. at 580-81

(Kennedy, J., concurring). And unlike in *Defenders*, here it is *entirely* "reasonable to assume" that the Conservation Groups' members "will be using [affected portions of the national forests] on a regular basis," *id.* at 579, given the application of the regulations nationwide and the broad range of organizations that brought suit. The majority in *Defenders* recognized that standing was a given where, as here, the plaintiffs' "members would obviously be concretely affected" by actions taken without observance of procedural rights. *Id.* at 573 n.8. In this case, such obvious concrete effects have been confirmed by declarations establishing dozens of instances where procedural violations have injured or threatened concrete injury to the plaintiffs.

V. The District Court Did Not Abuse Its Discretion in Setting Aside the Regulations

The Forest Service did not ask the district court to confine its ruling to one site-specific action, but instead asked that it be confined to all activities in the Eastern District of California. The district court considered that request, balancing the nationwide harms suffered by the Conservation Groups with the government's interests, and decided that circumstances did not justify limiting its order. Pet. App. 31a-33a, 25a-28a. The court of appeals properly found that the APA authorized nationwide relief and that the district court did not abuse its discretion in granting it. Pet. App. 22a.

A. The APA Empowers Courts to Set Regulations Aside

The APA says a reviewing court "shall … hold unlawful and set aside agency action" that is not in accordance with law, 5 U.S.C. § 706, but further pro-

vides that "[n]othing herein … affects … the power … of the court to … deny relief on any … appropriate legal or equitable ground." 5 U.S.C. § 702. These provisions empower courts to vacate unlawful agency actions but provide discretion to limit relief as circumstances demand. *See Abbott Labs.*, 387 U.S. at 148 ("[I]njunctive and declaratory judgment remedies are discretionary …."); *see also Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("Although the district court has power to do so, it is not required to set aside every unlawful agency action. The court's decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity."). This discretion is not, however, unlimited: The APA's "shall … set aside" language indicates that the government must provide a substantial reason to avoid having unlawful action set aside, and a court must provide "relief ... consider[ed] necessary to secure prompt compliance with the Act" that has been violated. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

The government asserts that "setting aside" a regulation does not mean vacating or invalidating it, but only means "put[ting] it to one side" in determining whether an action applying it is lawful. Pet. Br. 43 n.15 (citing Webster's Third New International Dictionary of the English Language 2077 (1993)). The government's selective dictionary citations do not support its novel assertion that the APA does not authorize courts to vacate unlawful regulations. Even Webster's Third contradicts the government's argument, as its definitions include "DISCARD" and, unmentioned by the government, "ANNUL, OVERRULE"—the definition most applicable to legal usage.

Other definitions unequivocally indicate that "set aside" means to invalidate. *See* Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 Seton Hall L. Rev. 108, 130-31 (2001) ("Black's Law Dictionary defines 'set aside' as '[t]o reverse, vacate, cancel, annul, or revoke a judgment, order, etc.' Similarly, The American Heritage Dictionary defines 'set aside' as '1. To separate and reserve for a special purpose. 2. To discard or reject. 3. To declare invalid; annul or overrule: The court has set aside the conviction.'").[14] As the D.C. Circuit recently put it:

> "Set aside" usually means "vacate." *See* BLACK'S LAW DICTIONARY 1404 (8th ed. 2004) (defining "set aside" as "to annul or vacate"); *cf. Checkosky v. SEC,* 23 F.3d 452, 491 (D.C. Cir. 1994) (op. of Randolph, J.) ("Setting aside means vacating; no other meaning is apparent."); *Action on Smoking & Health v. Civil Aeronautics Bd.,* 713 F.2d 795, 797 (D.C. Cir. 1983) ("To vacate ... means to ... set aside.") (internal quotation marks and citation omitted).

Virgin Islands Commun. Corp. v. FCC, 444 F.3d 666, 671 (D.C. Cir. 2006). Though there is debate over when it is permissible *not* to vacate unlawful regulations, "judicial practice confirms that the power to 'set aside' regulations at least includes the power to vacate regulations." Prestes, *supra*, at 130.

This Court, too, has repeatedly used "set aside" to describe invalidating a regulation. *See, e.g., Watters*

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[14] *See also* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 309-10 (2003) (recognizing that "set aside" literally means "vacate").

v. Wachovia Bank, N.A., 127 S.Ct. 1559, 1576 n.10 (2007) ("In *Investment Company Institute v. Camp,* 401 U.S. 617 (1971), we set aside a regulation … authorizing banks to operate collective investment funds because that activity was prohibited by the Glass-Steagall Act. Similarly, in *Securities Industry Assn. v. Board of Governors, FRS,* 468 U.S. 137 (1984), the Glass-Steagall Act provided the basis for invalidating a regulation authorizing banks to … sel[l] third-party commercial paper."); *see also, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB,* 522 U.S. 359, 374 (1998); *Sable Commun. of Cal. v. FCC*, 492 U.S. 115, 121 (1989); *Bd. of Gov. of Fed. Res. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 363 (1986); *Chevron U.S.A., Inc. v. NRDC.*, 467 U.S. 837, 841-42 (1984); *Batterton v. Francis*, 432 U.S. 416, 426 (1977); *United States v. Midwest Video Corp.*, 406 U.S. 649, 657 (1972).[15]

Lower courts agree that § 706 authorizes courts to vacate regulations. *See, e.g., Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("'When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'") (citation omitted). The government cites *Virginia Soc'y for Human Life, Inc. v. FEC* as exemplifying the proper limits on relief in an APA challenge to a regu-

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[15] Other statutes and rules also use "set aside" as a legal term meaning vacate or invalidate. *See, e.g.,* 28 U.S.C. 2106 (appellate courts may "set aside" judgments); 28 U.S.C. 2255 (post-conviction proceedings to "set aside" a sentence); Fed. R. Civ. P. 60(b) (courts may "set aside" their judgments).

lation, Pet. Br. 43 n.15, but the Fourth Circuit limited relief there because "VSHL is the only plaintiff." 263 F.3d 379, 393 (4th Cir. 2001). The court acknowledged that nationwide relief is available where plaintiffs "from across the country" are before the court because "[n]ationwide injunctions are appropriate if necessary to afford relief to the prevailing party." 263 F.3d at 393. Thus, even the authority relied upon by the government contradicts its position that nationwide relief is unavailable under the APA.

B. Estoppel Doctrine Does Not Eclipse the Power to Set Aside Agency Action Under the APA

The Forest Service argues that nationwide relief is improper because of the prohibition against non-mutual offensive collateral estoppel against the government. *See* Pet. Br. 43-47 (citing *United States v. Mendoza*, 464 U.S. 154 (1984)). *Mendoza*, however, did not address the proper scope of relief in cases brought to set aside unlawful agency action; it held only that preclusion doctrines should not be used to expand the effect of an *earlier* judgment. *See id.* at 160. Neither *Mendoza* nor any other authority holds that preclusion doctrine controls a district court's equitable power to issue relief under the APA in the case before it.

Mendoza declined to apply the developing common-law doctrine of non-mutual offensive collateral estoppel against the federal government because concerns that favored allowing the government to relitigate issues in different forums outweighed com-

peting interests in conservation of judicial resources. 464 U.S. 158-163.[16] This case, however, involves not competing common-law policy choices, but the statutory commands of the APA. Although the APA may grant the courts discretion to limit relief to allow repeat litigation, the government's argument that a regulation may *never* be set aside in an APA action would negate the APA's language explicitly authorizing such relief.

Moreover, this Court has specifically *rejected* the argument that preclusion concerns prevent district courts from ordering nationwide relief in appropriate cases. In *Califano v. Yamasaki*, 442 U.S. 682 (1979), a class action in which the lower courts awarded nationwide relief requiring the government to provide hearings in Social Security cases, the government argued that its interest in relitigating issues required a per se rule against nationwide relief. While acknowledging that the government's interests should be considered in the exercise of remedial discretion, the Court declined to prohibit nationwide relief:

> [N]ationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing, in certain cases, the pressures on this Court's docket. … For this reason, a federal

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[16] Simultaneously, the Court approved *mutual* collateral estoppel against the government, indicating that freeing the government to relitigate issues in different courts is not always paramount even when the Court's ability to give effect to that interest is not constrained by statute. *See United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984).

> court … should take care to ensure that nationwide relief is indeed appropriate in the case before it, and … would not improperly interfere with the litigation of similar issues in other judicial districts. But we decline to adopt the extreme position that such a class may never be certified.

Id. at 702-03.

The government argues that nationwide relief should be limited to class actions or cases under special review provisions, and that permitting it under the APA "subjects the government to the risks and burdens associated with a nationwide class action or special review provision, without providing the government the corresponding benefit—a definitive resolution of the disputed legal issue binding upon a broad range of potential plaintiffs." Pet. Br. 46-47. But the government does not explain why nationwide relief is less appropriate in a case involving multiple plaintiffs facing injury across the country than in a class action. As the Fourth Circuit has observed, "[a]n injunction warranted by a finding of unlawful [action] is not prohibited merely because it confers benefits upon individuals who were not plaintiffs or members of a formally certified class." *Evans v. Harnett County Bd. of Educ.,* 684 F.2d 304, 306 (4th Cir. 1982)) (citation omitted); *see also Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 374 (5th Cir. 1981) ("Injunctive relief which benefits non-parties may sometimes be proper even where the suit is not brought as a Rule 23 class action.") (citation omitted).

The government also overlooks that the APA, no less than special review statutes, expressly authoriz-

es courts to award the relief granted here—setting aside agency action.[17] If such relief has the practical effect of limiting relitigation by the government, that is "an inevitable consequence of the venue rules in combination with the APA's command that rules 'found to be … in excess of statutory jurisdiction' shall be not only 'h[e]ld unlawful' but 'set aside.'" *Nat'l Mining,* 145 F.3d at 1410, (Williams, J.) (quoting 5 U.S.C. 706(2)(C)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (rules found invalid under "the APA cannot be afforded the 'force and effect of law'") (citations omitted).

Moreover, courts can accommodate the government's concerns without a blanket rule prohibiting nationwide relief in APA cases. In *Abbott Labs*, where the Court understood that the effect of entertaining the action would be an order setting aside the FDA's regulation if the plaintiffs prevailed, the Court catalogued some of the steps available to protect the government's legitimate interests: "The Government contends, however, that if the Court allows this consolidated suit, then nothing will prevent a multiplicity of suits in various jurisdictions challenging other regulations. The short answer to this contention is that the courts are well equipped to deal with such eventualities" through such mechanisms as venue transfer, stays of proceedings, dismissal, intervention, application of laches, and/or joinder. *Abbott Labs.,* 387 U.S. at 154-55. The Court also noted the potential advantage to the *government* (not

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[17] Special review statutes typically use the same language as the APA to describe the relief they authorize—"set[ting] aside" agency regulations. *See, e.g.,* 28 U.S.C. 2342.

to mention to the interest in judicial economy) of having the regulation's validity decided in an action that would bind a large number of plaintiffs. *Id.* at 155; *see also Nat'l Minin*g, 145 F.3d at 1409 (denial of nationwide relief may generate a flood of duplicative litigation).

Similarly, in *Taylor v. Sturgell*, No. 07-371 (June 12, 2008), this Court rejected the government's position that preclusion principles should be expansively applied out of fear that public interest plaintiffs will repetitively litigate until one wins, with the last outcome effectively binding the government:

> [W]e are not convinced that this risk justifies departure from the usual rules. …. First, *stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when *stare decisis* is not dispositive, "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others."

Slip op. at 21-22 (citation omitted). As in *Taylor*, the government here has not documented that the longstanding practice of setting aside facially invalid regulations under the APA has had any untoward effect.

In the end, the government seeks a judicial amendment of the APA to promote its preferred policies. That job must be left for Congress, which can amend the APA to foreclose challenges to regulations or route them to particular courts. *See Ali v. Fed. Bur. of Prisons*, 128 S. Ct. 831, 841 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable."). Congressional intent

to bar equity powers must be clear: "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Weinberger v. Romero-Barcelo*, 456 U.S. at 313. The authority the APA grants courts to "set aside" unlawful regulations contains no such express limitation, and it is not up to this Court to create one.

C. The District Court Exercised Its Discretion Appropriately

The district court's exercise of its discretionary power to set aside the regulations was entirely proper. The court recognized that the Conservation Groups were affected by the regulations in national forests across the country. Thus, nationwide relief was "not 'more burdensome than necessary'" to afford complete relief to the parties before the court, Pet. App. 31a (quoting *Califano v. Yamasaki*, 442 U.S. at 702), and the equities favoring such relief outweighed the government's interest in repetitive litigation over the issue:

> Agencies are sometimes allowed to confine a ruling of one court to that circuit and proceed with their conflicting interpretation of the law elsewhere.
>
> ***
>
> The Court is sensitive to the Forest Service's interest in fully developing the legal issues implicated by the notice, comment, and appeal regulations. … However, in order to adequately redress the harm suffered by Plaintiffs, the invalidation of the Forest Service regulations …

> must reach beyond the borders of the Eastern District of California.

Id. at 31a-32a.

Moreover, relief here could not practicably have been limited to the parties before the court. *See* Pet. Br. 43 n.15. Granting ARA procedural rights only to the organizations who brought suit, while denying them to other persons and organizations, would be impossible and serve no purpose for the agency. "Because relief for the named plaintiffs in this case would also necessarily extend to all [other interested persons]," *Washington v. Reno*, 35 F.3d 1093, 1104 (6th Cir. 1994), the district court did not abuse its discretion in not limiting relief to the named parties.

In sum, the district court had the power to grant nationwide relief, and fully considered the equities on both sides of the issue. The court of appeals did not err in upholding that exercise of discretion, and the Court should likewise not reverse it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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